MOTION FILED

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No. 93-377

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*,

*Petitioners*,

v.

MILHELM ATTEA & BROS., INC., *et al.*,

*Respondents*.

**On Writ of Certiorari to the Court of Appeals of the State of New York**

## MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF *AMICI CURIAE* SAINT REGIS MOHAWK TRIBE AND MOHAWK TAX STEERING COMMITTEE IN SUPPORT OF RESPONDENTS

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## MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF OF *AMICI CURIAE* SAINT REGIS MOHAWK TRIBE AND MOHAWK TAX STEERING COMMITTEE IN SUPPORT OF RESPONDENTS

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*Amici curiae* the Saint Regis Mohawk Tribe and the Mohawk Tax Steering Committee move for leave to file the supplemental brief accompanying this motion.

1. The issue in this case is whether the State of New York has the power to regulate trade occurring within Indian territory, including the lands of *amicus* Saint Regis Mohawk Tribe. Specifically, New York's Department of Taxation and Finance seeks to require pre-collection of excise taxes by wholesalers that sell cigarettes to Indian customers for resale to non-Indian consumers.

2. The parties to this case have addressed this issue in the context of the federal Indian trader statues, 25 U.S.C. §§ 261 -

264. The New York Court of Appeals below invalidated New York's cigarette wholesaler regulations on the ground that they are pre-empted by the federal Indian trader laws. *See Milhelm Attea & Bros., Inc., v. Department of Taxation and Fin.*, 615 N.E.2d 994 (N.Y. 1993).

3. The Saint Regis Mohawk Tribe and the Mohawk Tax Steering Committee filed a brief *amici curiae* in support of Respondents, arguing that the federal Indian trader laws pre-empt New York's regulation of cigarette wholesalers that trade with Indians on Indian land.

4. In briefs *amicus curiae*, the Solicitor General of the United States and the Seneca Nation of Indians addressed another issue in addition to the pre-emptive effect of the federal Indian trader laws, namely, the pre-emptive effect of certain treaties to which the Saint Regis Mohawk Tribe is a party. *See* Brief of the Seneca Nation of Indians *Amicus Curiae* at 18-29; Brief of the Solicitor General *Amicus Curiae* at 21-24.

5. The treaty issue addressed by the Solicitor General and the Seneca Nation was not raised by the parties or addressed by the courts below. The question presented in New York's petition for a writ of certiorari did not mention the effect of the treaties, and that issue was not raised in the petition itself. Neither Petitioners nor Respondents mentioned the treaty issue in their briefs in this Court or in any court below. In general, this Court will not consider a legal issue that was not pressed or passed upon in the courts below. *See, e.g., Yee v. City of Escondido*, 112 S.Ct. 1522, 1531 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983).

6. Analysis or decision of the treaty issue at this time necessarily would affect the rights and interests of *amicus* Saint Regis Mohawk Tribe and other Native American tribes not currently before the Court, in areas far beyond the scope of the tax issue in this case.

7. In analogous circumstances, this Court has granted leave for an *amicus* to file a supplemental brief. *See, e.g., Goldsboro*



*Christian Schools, Inc. v. United States*, 456 U.S. 922 (1982) (*amicus* allowed to file supplemental brief on issue first raised by Respondent in supplemental memorandum); *see also Building & Construction Trades Council v. Associated Builders of Massachusetts/Rhode Island, Inc.*, 113 S.Ct. 651 (1993); *Dixon v. Westinghouse Elec. Corp.*, 484 U.S. 910 (1987); *Boyle v. United Technologies Corp.*, 483 U.S. 1043 (1987); *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 458 U.S. 1128 (1983); *Commonwealth of Massachusetts v. Laird*, 400 U.S. 886 (1970).

8. Filing of the accompanying supplemental brief *amici curiae* will not prejudice any party or delay the adjudication of this case. Petitioners agree that the treaty issue should not be considered. *See* Reply Brief for Petitioners, at 2 n.1.

## CONCLUSION

For the foregoing reasons, the motion of *amici curiae* for leave to file the accompanying supplemental brief should be granted.

Respectfully submitted,

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## SUPPLEMENTAL BRIEF OF *AMICI CURIAE* SAINT REGIS MOHAWK TRIBE AND MOHAWK TAX STEERING COMMITTEE IN SUPPORT OF RESPONDENTS

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*Amici curiae* the Saint Regis Mohawk Tribe and the Mohawk Tax Steering Committee filed a brief in this case in support of Respondents addressing the pre-emptive effect of the federal Indian trader statues, 25 U.S.C. §§ 261 - 264. That issue is encompassed by the question presented on which this Court granted certiorari and was decided below by the New York Court of Appeals. Briefs *amicus curiae* filed by the Solicitor General of the United States and the Seneca Nation of Indians in support of Respondents also discuss another, separate issue: whether certain treaties entered into by Indian tribes and 25 U.S.C. § 233, which expressly limits New York State's authority to tax Indians, preclude New York from imposing taxes on and regulating sales of cigarettes by wholesalers to Indians on Indian land. *See* Brief

of the Solicitor General *Amicus Curiae* at 21-24; Brief of the Seneca Nation *Amicus Curiae* at 18-29.

In their briefs in support of Respondents, the Solicitor General and the Seneca Nation reach opposite conclusions regarding the treaty issue. Although *amici* Saint Regis Mohawk Tribe and the Mohawk Tax Steering Committee agree with the position of the Seneca Nation that the treaties involved preclude New York from imposing its taxes on activities occurring on Indian territory,[1] we respectfully urge this Court not to reach the treaty issue in this case.

The treaty issue was neither briefed nor argued below by any party. As a result, the issue has not been discussed in any judicial decision in the record. New York State's petition for a writ of certiorari does not present the treaty issue. Given the absence of any discussion of the issue in the briefs filed by the parties in this case, it appears that no party will present oral argument on the treaty issue. The treaties involved are not in evidence, and there have been no hearings, testimony, or briefs on the meaning and application of the treaties or the historical context in which they were made. Given these circumstances, a decision on the treaty issue by the Court in this case would be ill-advised.

In reviewing state court decisions, this Court generally will not consider arguments that were not both pressed and passed upon in the courts below. *See, e.g., Yee v. City of Escondido*, 112 S.Ct. 1522, 1531 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983). This Court declines to consider such new issues because "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (quoted in *Illinois v. Gates*, 462 U.S. at 221).

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[1] *See* Brief of Saint Regis Mohawk Tribe and Mohawk Tax Steering Committee *Amici Curiae* at 9-10 n. 6.



In the pending case, as noted, the parties and the courts below have not discussed the treaty issue.

Analysis or decision of the treaty issue at this time also necessarily would affect the rights and interests of *amicus* Saint Regis Mohawk Tribe and other Native American tribes not currently before the Court, in areas far beyond the scope of the tax issue in this case.

Reserving decision on the treaty issue will not impair this Court's ability to resolve the question pending before it in this case. If the Court affirms the judgment below, the treaty issue will be moot. If the judgment below is reversed, the Court may remand, if appropriate, the treaty issue for consideration by the New York Court of Appeals in the first instance.

## CONCLUSION

For the foregoing reasons, the question of the pre-emptive effect of certain treaties governing Indian tribes and 25 U.S.C. § 233 should be reserved for another time.

Respectfully submitted,

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